

**IN THE HIGH COURT OF SOUTH AFRICA**  
**FREE STATE DIVISION, BLOEMFONTEIN**

Case No.: 5280/2014

In the matter between:

**NYUMBA MOBILE HOMES &**  
**OFFICES (PTY) LTD**

Applicant

And

**MEC: DEPARTMENT OF HEALTH**  
**FREE STATE PROVINCE**

1<sup>ST</sup> Respondent

**FEZILE DABI DISTRICT MUNICIPALITY**

2<sup>ND</sup> Respondent

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**HEARD ON:** 10 MARCH 2016

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**JUDGMENT BY:** C. REINDERS, J

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**DELIVERED ON:** 17 MARCH 2016

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- [1] This is an application for condonation in terms of section 3(4)(a) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (the Act). The application is opposed only by the second respondent, Fezile Dabi District Municipality (the municipality).

- [2] During December 2011 the first respondent awarded a “joint tender” to Ramalephatso Industries CC and Sizampilo Projects CC (the contractors). The applicant was appointed as a sub-contractor for the contractors to erect structures to be used as general wards and a temporary mortuary at the Metsimahole Hospital in Sasolburg. The municipality was appointed by the first respondent to implement, facilitate and monitor construction of the hospital and to effect payments in terms of the tender.
- [3] Construction commenced during January 2012. As the contractors still owed the applicants a substantial amount by April 2013, the applicant and contractors entered into a written cession agreement on 26 June 2013 in terms whereof the indebtedness was acknowledged and the contractors ceded, transferred and made over their right, title and interest against the municipality, to the applicant. The cession agreement was made an order of court on 4 July 2013.
- [4] The applicant completed the project in January 2014 and payment was demanded from the municipality’s principle agent, Mazibuko Wessels Architects on 30 January 2014. No response was forthcoming and the applicant gave notice in terms of the provisions of the Act on 2 September 2014 via e-mail (letter of demand dated 15 August 2014) to the first respondent and the municipal manager of the municipality. The

said letters, as well as proof of e-mailing thereof, are annexed as respectively annexures “PL6” and “PL7” to the applicant’s founding affidavit. On 11 September 2014 the first respondent acknowledged receipt of the said notice but noted as follow:

“Please be informed that your notice does not comply with Act 40 of 2000.”

The municipality however in its opposing affidavit perseveres that it never received any notice in terms of the Act.

- [5] In adjudicating upon condonation for the late filing of the prescribed statutory notice of an intention to institute legal proceedings against an organ of State, the applicable provisions of section 3 of the Act read as follows:

“(4)(a) If an organ of State relies on a creditor’s failure to serve a notice in terms subsection (2)(a), the creditor may apply to a court having jurisdiction for condonation of such failure.

(b) The court may grant an application referred to in paragraph (a) if it is satisfied that-

- (i) the debt had not been extinguished by prescription;
- (ii) good cause exists for the failure by the creditor; and
- (iii) the organ of State was not unreasonably prejudiced by the failure.”

- [6] It is trite that a court’s power to grant condonation is circumscribed by section 3(4)(b) in requiring that it be satisfied that all the requirements as set out, are met. These

requirements are conjunctive and must be established by the applicant.

**See: Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd** 2010 (4) SA 109 (SCA) at par [11].

- [7] The applicant relies on an extant cause of action and the issue was neither contested by the municipality in its heads of argument nor by Mr Roux on behalf of the municipality in oral submissions. I am satisfied that the first requirement in considering condonation, namely that the debt has not been extinguished by prescription, has been met.
- [8] I next turn to the requirement that the organ of State was not unreasonably prejudiced by the failure to serve the statutory notice within the prescribed six month period. The municipality avers that they would suffer prejudice as they had no knowledge of the cession agreement between the applicant and the contractors. Mr Roux submitted that it is clear from the cession agreement that no officials from the municipality were signatories to the contract. However, from the court order dated 4 July 2014, it is evident that the municipality was one of the parties who was interdicted from making any payments to the contractors. In the same court order the cession agreement was made an order of court. Furthermore, in the answering papers of the municipality the deponent, me Lindi Molibeli, in reply to knowledge of the session, states that the municipality was “not served with the documents as required and it came to

our attention when papers were served.” This to my mind is indicative of the fact that the municipality at least by 4 July 2013 had knowledge of the intended action against them.

[9] On 10 February 2015 when the opposing affidavit was deposed to, it was alleged in regard to possible prejudice to the municipality that “some witnesses to the matter are no longer in the employ of the second respondent, e.g. (sic) Dr Mongake who was the municipal manager.” To my mind this averment does not hold water in view of the municipality’s knowledge of ongoing disputes regarding payment as early as July 2013 after the applicant commenced construction only a year before. The defendant on the papers have thus not been prejudiced due to the late filing of the statutory notice in as far as the preparation for trial and/or the obtaining of witnesses or evidence are concerned.

[10] The main purpose of the statutory notice, to wit to inform the defendant of a potential claim to enable it to investigate same timeously, to gather evidence and to consider its position on this specific cause of action, **(See: Mohlomi v Minister of Defence** 1997 (1) SA 124 CC par [9]) could already have been dealt with when the municipality obtained knowledge through the court order dated 4 July 2013. I am at ease therefore to find that that the defendant was not unreasonably prejudiced by the late filing of the statutory notice by the applicant.

[11] The remaining requirement is whether good cause for failing to deliver the statutory notice as prescribed by section 2 of the Act, was established by the applicant. In **Madinda v Minister of Safety and Security** 2008 (4) SA 312 (SCA) at para [8] it was held that an applicant's burden of establishing good cause has to be discharged not on a balance of probabilities, but rather on the overall impression made on the court which brings a fair mind to the facts set up by the parties.

[12] Although good cause within the meaning of section 3(4)(ii) has not been defined, it may include a number of factors which will vary from case to case. These include prospects of success, the reasons for delay, sufficiency of the explanation offered and the bona fides of an applicant.

**See: Madinda** *supra* par [10].

All the relevant circumstances must be assessed in a balanced fashion. The fact that the applicant is strong in certain respects and weak in others will be borne in mind in the evaluation of whether the standard of good cause has been achieved.

**See: Madinda** *supra* par [13].

[13] Absence of unreasonable prejudice falls to be decided separately as a specific requirement to be met by an applicant.

Whereas good cause primarily concerns the applicant's conduct and its motives, the absence of unreasonable prejudice shifts the focus onto the State organ and the protection of its interests by receiving timeous notice.

**See: Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd** *supra* at par [38].

[14] In attempting to show good cause for the delay the applicant dealt with this aspect only in two paragraphs under the heading "Good cause for the failure by the creditor". It is averred that the applicant did give notice to the first respondent and further "unfortunately the notice that was prepared for the attention of the second respondent was not sent, due to an oversight." This explanation tendered by the applicant is indeed skimpy and vague. However, this should be weighed up against the background to the application as was indeed fully dealt with by the applicant, to wit the history of the matter, including the involvement of the municipality and the lengths that the applicant had to go to in securing payment for services rendered.

[15] Although the applicant was late in filing its replying affidavit (for which condonation was granted) and took some time in issuing summons, it is clear from the history of this matter and the papers before me that the applicant indeed had the intention of instituting a claim against the municipality for recovering the

debt owing to them. I cannot reasonably conclude that the applicant is not seriously interested in pursuing litigation or that the bona fides of the applicant is under suspicion.

- [16] It is trite that the prospects of success of the intended claim play a significant role. Strong merits may mitigate fault, no merits may render mitigation pointless. In its answering papers the municipality alleged that the fact that no summons had been served by the applicant, is fatal to the granting of condonation. It has been held that the issuing of summons is not a prerequisite for an application for condonation in terms of the Act (**See: Minister of Safety and Security v De Witt** 2009 (1) SA 457 (SCA) at 457). Summons has in any event since already been issued more than a year ago. In its heads of argument the municipality submitted that the applicant does not have any chances of success in the main action. From the papers before me it does not appear that the municipality has pleaded to the summons, nor is any averment made in this regard in the heads of argument filed on 2 March 2016. Although knowledge of the cession agreement is denied by the municipality, it is common cause that such an agreement was concluded and in fact made an order of court. In terms hereof the applicant indeed has good prospects of success in the main action as is evident from the summons that was issued. Based on the aforementioned I am not of the view that it can be concluded that the applicant does not have good prospects of success in the main action.

[17] In general terms the interest of justice play an important role in condonation applications.

**See: Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)** 2008 (4) BCLR 442 para [20].

It cannot be disputed that the applicant delivered a very important service to the community by erecting structures to be used as general wards and a temporary mortuary at the Metsimahole Hospital in Sasolburg. The dispute regarding the money still due to them stands to be adjudicated. In the circumstances, having taken all the relevant factors into consideration, I am of the view that the interest of justice requires that condonation be granted instead of dismissing the application, having the effect that the applicant may not fully ventilate the dispute against all of the defendants, including the municipality.

[18] It is trite that the very purpose of the provision allowing condonation is to give a court a discretion to determine whether the organ of State can rely on con-compliance.

**See: Minister of Safety and Security v de Witt** supra at para [12].

The overall impression that I have come to taking all the above mentioned factors into account is that the attempt by the

applicant to show good cause was indeed not flawless, but I am exercising my discretion in favour of the applicant and granting it the opportunity to have its claim tested according to the dictates of law and justice.

[19] The applicant prays for an indulgence of this court in requesting the granting of condonation, and I am not of the view that the municipality was acting in bad faith in opposing this application. In as far as the cost of 18 February 2016 is concerned, Mr Bruwer tendered an explanation that the court file “went missing” and therefore the application had to be removed from the roll. However, as was correctly pointed out in the heads of argument filed by Mr Ponane on behalf of the municipality, the applicant did not file its heads of argument and practice note timeously in terms of the practise of this Division on 10 February 2016, but only alerted the offices of the municipality’s attorneys of record on 12 February 2016 that the court file could not be found and that the matter thus had to be removed from the roll. I would have expected the applicant to have been aware of the file gone missing long before 12 February 2016 had preparation for filing of the heads of argument commenced timeously. I am of the view that the applicant should bear the costs in both instances.

[20] I consequently make the following orders:

1. Condonation is granted to the applicant for failure to serve the notice contemplated in section 3(1)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 within the period laid down in section 3(2)(a) of the Act.
2. The applicant is ordered to pay the costs of this application, including the wasted costs of 18 February 2016.

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**C. REINDERS, J**

On behalf of Applicant:

Mr M Bruwer  
Instructed by:  
S Roux Incorporated  
Pretoria  
c/o Hugo & Bruwer Attorneys  
BLOEMFONTEIN

On behalf of Respondent:

Adv A Roux  
Instructed by:  
Ponoane Attorneys  
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